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In the Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

UNITED STATES OF AMERICA, PETITIONER

EDITH LOUISE GRIGGS, AS EXECUTRIX OF THE ESTATE
OF DUDLEY R. GRIGGS, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

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v.

EDITH LOUISE GRIGGS, AS EXECUTRIX OF THE ESTATE
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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on November 16, 1949.

OPINIONS BELOW

The opinion of the District Court (R. 5) is not reported. The opinion of the United States Court of Appeals for the Tenth Circuit (R. 6-9) is reported at 178 F. 2d 1.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1949 (R. 9). A petition for

rehearing was denied on January 9, 1950 (R. 26-27). The jurisdiction of this Court is invoked under 28 U. S. C. 1254-(1).

QUESTION PRESENTED

Whether the dependents of a member of the armed forces may recover damages, under the Federal Tort Claims Act, for his death which was incident to his military service, and occurred as a result of the negligence of other military personnel.

STATUTE INVOLVED

Sections 1346(b), 1402(b), 2674, and 2680 of Title 28, United States Code [formerly the provisions of the Federal Tort Claims Act],¹ are set forth in the Appendix, *infra*, pp. 6-9.

STATEMENT

Edith Louise Griggs, the respondent herein, brought the instant suit as executrix of the estate of Dudley R. Griggs, deceased, to recover damages under the Federal Tort Claims Act for the wrongful death of her husband. Her complaint alleged that on November 30, 1947, her husband, who then "was on active duty" as a "Lieutenant

¹ Since the revision and codification of Title 28 of the United States Code, which was enacted into law by the Act of June 25, 1948 (Public Law 773, 80th Congress, 2d session), became effective September 1, 1948, the new code citations are used throughout this petition, although the new code sections which are here relevant are for convenience still referred to in the aggregate as the Federal Tort Claims Act. The rights of litigants in pending suits, under the former law, are, of course, preserved (Section 2(b) of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess.), but the revision does not appear to have changed the applicable law in any respect which is here material.

Colonel in the Army of the United States," was directed by "official orders" to report to the "Army Hospital at Scott Field Army Air Base. * * * for the purpose of submitting to treatment and an operation" (R. 2). The complaint further alleged that he died while undergoing this treatment as a result of the negligence of the Army Medical Corps members who treated him (R. 3).

The District Court sustained the motion of the United States to dismiss on the ground that the complaint did not state a claim on which relief could be granted under the Federal Tort Claims Act (R. 5). The Court of Appeals for the Tenth Circuit reversed, with Circuit Judge Huxman dissenting (R. 6-9).

REASONS FOR GRANTING THE WRIT

The issue presented by this case, in common with *Feres v. United States*, 177 F. 2d 535 (C. A. 2) (petition for a writ of certiorari, No. 558, this Term, granted on March 13, 1950), *Ostrander v. United States*, 178 F. 2d 923 (C. A. 2), and *Jefferson v. United States*, 178 F. 2d 518 (C. A. 4) (petition for a writ of certiorari, No. 381 Misc., this Term, granted on March 13, 1950), is whether an injury or death sustained by a member of the armed forces incident to his military service is compensable under the Federal Tort Claims Act. In *Brooks v. United States*, 337 U. S. 49, this Court held that recovery can be had under the Federal Tort Claims Act for injuries to, or death of, a serviceman not incident to his service. Al-

though we believe that a fair reading of that opinion (pp. 52-3) indicates that the Court was inclined toward the view that recovery could not be had where the injury was incident to the service, the disposition of that question was specifically reserved. The court below has held that recovery may be had in the service-incident situation.² The Second Circuit in the *Feres* (see R. 19-21) and *Ostrander* cases, and the Fourth Circuit in the *Jefferson* case (see R. 22-25), have held that it may not.

In the *Jefferson* case, the Fourth Circuit expressly recognized the conflict in the circuits by observing that "the question not decided by the Supreme Court [in the *Brooks* case] has been considered in the Second and Tenth Circuits [i.e., in the *Feres* and *Griggs* cases, respectively] which came to opposite conclusions," and then itself went into conflict with the opinion of the Tenth Circuit in the instant case by stating that its views "accord with the conclusions reached by the Second Circuit." *Jefferson v. United States*, 178 F. 2d 518, 519 (see R. 23-4).

In view of the importance of the question, the frequency with which the issue arises, and the direct conflict among the circuits, we filed memoranda stating that we were not opposed to the granting of the petitions for writs of certiorari in the *Feres* and *Jefferson* cases. For the same reasons,

² In *Brooks*, the Court specifically refers to injuries resulting from "an army surgeon's slip of hand" as incident to military service. 337 U.S. at 52.

review of the instant decision is warranted.

CONCLUSION

It is respectfully submitted, therefore, that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1950.

APPENDIX

Sections 1346(b), 1402(b), 2674, and 2680 of Title 28, United States Code, provide:

§ 1346. United States as defendant.

* * * * *

(b) Subject to the provisions of chapter 173 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

§ 1402. United States as defendant.

* * * * *

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

§ 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

§ 2680. Exceptions.

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.